Supreme Court, U.S.
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No. 99-____

IN THE
SUPREME COURT OF THE UNITED STATES

FERRELL TRAVIS RILEY AND CHERYLL S. COON

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court of appeals may in engage in a *sua sponte* harmless error review in an appeal from a lengthy and complex criminal trial, where the government failed to make any harmless error argument on appeal.

2. Whether a court must consider repayments made by the defendants to victims of fraud when calculating the amount of loss under U.S.S.G. § 2F1.1, where the repayments are made well before the threat of investigation or legal action, are not intended to conceal any wrongful conduct, and do not occur after the discovery of the alleged fraud.

LIST OF PARTIES

The parties to the proceeding below were:

Ferrell Travis Riley, Defendant-Appellant

Cheryll S. Coon, Defendant-Appellant

United States of America, Plaintiff-Appellee

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Ferrell Travis Riley and Cheryll S. Coon, respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on July 28, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 187 F.3d 888 (8th Cir. 1999)

and is reproduced at Pet. App. A, *infra*, 1a-21a. The order of the Eighth Circuit denying rehearing is unreported and is reproduced at Pet. App. B, *infra*, 22a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on July 28, 1999. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the court of appeals on August 29, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The constitutional provision at issue is the Sixth Amendment to the United States Constitution which provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

U.S. Const. Amend. VI.

2. The statutory sentencing provision at issue, U.S.S.G. § 2F1.1(b)(1), provides, in relevant part:

> If the loss exceeded $2,000, increase the offense level as follows:
>
> | Loss (Apply the Greatest) | Increase in Level |
> |---|---|
> | * * * * | |
> | (I) More than $200,000 | add **8** |
> | (J) More than $350,000 | add **9** |
> | (K) More than $500,000 | add **10** |
> | (L) More than $800,000 | add **11** |
> | * * * * | |

See U.S.S.G. § 2F1.1(b)(1).

STATEMENT OF THE CASE

This case presents two important questions of law on which the federal courts are in disagreement: (1) whether the government's failure to argue on appeal that a Confrontation Clause violation amounted to harmless error precludes a court of appeals from finding that the error was harmless, and (2) whether sentencing courts are required to consider repayments to victims in calculating the amount of "loss" applicable to a defendant's offense under U.S.S.G. § 2F1.1.

In this case, the government failed to present any harmless error argument in its appellate brief. Despite this fact, the court of appeals rejected the petitioners' Confrontation Clause challenge to their convictions on the grounds that the petitioners' proposed subjects for cross-examination were "adequately explored throughout the trial."

Pet. App. A, p. 10a-11a. This refusal to recognize the government's waiver of the harmless error issue conflicts with decisions rendered by the First, Third, Seventh, and Tenth Circuits, and appears to follow an approach advocated by a lone concurring judge in a decision rendered by the D.C. Circuit.

The Eighth Circuit also affirmed the district court's decision at sentencing to disregard completely the $674,102 in repayments made by petitioners to the victims of the fraud-related offenses. That conclusion is inconsistent with decisions rendered by the Sixth, Seventh and Ninth Circuits.

1. Factual Background

Petitioners Ferrell Travis Riley and Cheryll S. Coon, husband and wife, have worked together in the insurance industry for more than a decade. Tr. 2797.[1] The insurance companies with which they worked were primarily off-shore "surplus lines" insurers, which, by definition, sold lines of insurance otherwise unavailable to insureds.[2] Tr. 7-9. Surplus lines insurers often are exempt from state regulation. Accordingly, many state insurance commissioners view them as a threat to their jurisdiction, and have lobbied for legislation to close what they view as a "gap" in their regulatory authority. *See, e.g.*, Tr. 594-95, 624-28.

Before the events at issue in this case, petitioners and their companies operated in several states, providing insurance and reinsurance, paying claims, and funding the

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[1] "Tr. __" references in the text are citations to the trial transcript prepared below. "GX __" and "DX __" refer, respectively, to Government Exhibits and Defendants' Exhibits presented to the trial court.

[2] *See* COUCH ON INSURANCE 3D § 1:4 (1996).

defenses of their insureds. Tr. 2795-2800. This case primarily involves the petitioners' conduct in connection with two insurance-related companies: Meadowlark Insurance Company ("Meadowlark"), an offshore-based surplus lines insurance company, Tr. 2816-21; DX 1600, and M&M Management ("M&M"), a Wyoming-based management and marketing company that was formed in 1989, and served Meadowlark's clients in the United States. Tr. 2845.

In April 1991, Mr. Riley and Ms. Coon attended a meeting with the principals of Commercial Acceptance Insurance Company ("CAIC"), another offshore surplus lines insurance company licensed to operate in California. Tr. 8-9. CAIC was authorized to provide certain types of insurance in California, but not direct health insurance. Tr. 9, 119. The April 1991 meeting led to an agreement known as the "Reinsurance Treaty," in which CAIC agreed to allow M&M to underwrite business on CAIC's behalf. GX 17-3. In exchange, M&M, through Meadowlark, agreed to provide 100% reinsurance to CAIC for "[a]ll business underwritten by M&M Management Company on behalf of [CAIC]."[3] *Id.*

In August 1991, M&M, acting under the authority granted by CAIC, entered into an "Administration Agreement" with BDA, a California company that served as a third-party administrator of health benefit plans. *See* GX 18-1; Tr. 190-191. Under the Administration Agreement, BDA agreed to administer "certain employer sponsored insurance trusts." One such trust was "a block of business" for the WBA, a group organized in California and Arizona that offered benefits, including health insurance, to small employers. Tr. 175-76, 181. The WBA allowed these small

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[3] Such an arrangement, which is lawful, is commonly referred to as a "fronting contract." *See* GRAYDON S. STARRING, LAW OF REINSURANCE, § 2.6 (1993).

businesses to purchase health insurance benefits at otherwise unavailable group rates. *Id.* The WBA charged each of its members a monthly premium to participate in the plan. Tr. 182.

Sometime in August 1991, M&M, again acting pursuant to the authority granted by CAIC, agreed that CAIC would reinsure the WBA health benefit trust. Tr. 2890. Soon thereafter, M&M established an account labeled "M&M Management trust account" at Trans Pacific Bank in Alameda California. Tr. 185; GX 19-1. After WBA collected premium payments from its members, it would then make a payment to M&M that was deposited directly into the Trans Pacific account. Tr. 182. WBA members would submit their claims directly to BDA, which would evaluate, adjust, and administer the claims in order to determine the amount of coverage due. Tr. 198. BDA would then pay any amounts due claimants out of a separate "claims account" at Trans Pacific Bank, which M&M funded on an as-needed basis. Tr. 197.

Between August and December 1991, WBA deposited slightly more than one million dollars into the "M&M Management trust account." During that same period, M&M transferred approximately $400,000 from the "trust account" into the "claims account" at Trans Pacific. M&M transferred the remaining $650,000 out of the "trust account" to other M&M accounts in New Mexico and Missouri for other purposes. The petitioners, however, subsequently directed more than $674,000 to be paid to (or on behalf of) various WBA members from other accounts that they owned or controlled. *See* DX 120.

2. The District Court Proceedings

On November 16, 1994, a federal grand jury in the United States District Court for the Western District of Missouri returned an indictment against the two petitioners and one additional defendant.[4] The district court had jurisdiction over the case pursuant to 18 U.S.C. § 3231.

Much of the government's case against the petitioners revolved around renumbered Racketeering Acts One, Two and Four of Count One, which charged petitioners with violations of RICO, 18 U.S.C. § 1963(c), and renumbered Counts Seven and Eight, which charged petitioners with violating 18 U.S.C. § 2314. These racketeering acts and counts (hereinafter "the BDA charges") charged that the petitioners stole $650,000 from the "trust account" at Trans Pacific Bank.[5]

At trial, the government contended that the defendants exceeded the scope of the authority granted to them by CAIC when they entered into the agreements with WBA and BDA. The government also argued that the funds WBA paid into the "trust account" were to be used *exclusively* to pay health-care benefit claims. Thus, according to the government, the interstate transfers of approximately $650,000 by M&M constituted the interstate

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[4] Jack L. Brown was a defendant only to the mail fraud charges in the original indictment. Those charges were dismissed by the district court prior to trial.

[5] The other counts in the indictment charged petitioners with violations of mail fraud (18 U.S.C. § 1341), conspiracy (18 U.S.C. § 371), money laundering (18 U.S.C. § 1956), an additional Travel Act violation (18 U.S.C. § 1952) and obstruction of justice (18 U.S.C. § 1510) arising from the petitioners' various business activities. Petitioner Riley was also charged with two counts of tax fraud (18 U.S.C. § 7206(1)).

transportation of stolen property in violation of 18 U.S.C. § 2314.

In support of its theory of prosecution on the BDA charges, the government called as a witness Mr. Michael Trigueiro, a former CAIC executive who testified that the defendants exceeded the scope of authority granted by CAIC when they entered into the agreements with WBA and BDA. Tr. 25-27, 45-46. The government also called as a witness Mr. John Hyde, a former BDA executive, who testified about the arrangements involving BDA and the defendants. *See, e.g.*, Tr. 171-209.

The petitioners' theory of defense to the BDA charges was twofold. *First*, the petitioners sought to show that the WBA plan in fact was a group insurance trust subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq*. Accordingly, petitioners sought to establish that, as a matter of law, their conduct did not improperly make CAIC a direct insurer of the WBA plan participants. Rather, CAIC's role in the arrangement was as a *reinsurer* of the ERISA trust. At a minimum, petitioners sought to establish that they reasonably believed that the WBA was an ERISA trust, and was therefore capable of reducing its risk completely or in part through reinsurance.

Second, petitioners sought to establish that all of the parties to the transactions understood that the funds placed in the Trans Pacific Bank account could be used by M&M for any purpose, and were not, as the prosecution alleged, earmarked solely for paying claims. Thus, petitioners contended, their removal of the money from the Trans Pacific account could not have violated the law.

Consistent with these defense theories, the petitioners sought to challenge directly the versions of events presented

at trial by government witnesses Trigueiro and Hyde. Specifically, defendants sought to demonstrate that both men had been sued by disgruntled WBA members about issues relating to the criminal charges and that the existence of these lawsuits gave each man a powerful financial motive to blame petitioners for their business failures. Tr. 94, 300. When defense counsel sought to cross-examine these witnesses on this subject, however, the district court barred *all* questioning relating to the civil lawsuits. *See* Tr. 94-95; 300-01.

On February 12, 1996, the jury found petitioner Riley guilty on all eleven counts of the renumbered indictment, including the counts involving the BDA charges. Petitioner Coon was found guilty on ten of the eleven counts (including all of the BDA charges), and was acquitted on the remaining count.

After trial and prior to sentencing, defense counsel uncovered evidence demonstrating that, after the Trans Pacific Account was closed, M&M had paid an additional $674,102.78 to (or on behalf of) various WBA members out of other bank accounts. At sentencing, defense counsel presented detailed evidence regarding these payments, including a summary exhibit that reflected the identity of the payee, the identity of the WBA member beneficiary, the amount paid, the check number, and the date that the check had cleared the bank. *See* DX 120. The government never challenged this evidence, nor did it dispute the fact that the defendants caused these payments to be made well before they had any knowledge of any government investigation into their business dealings.

In calculating the amount of loss attributable to the BDA offense under U.S.S.G. § 2F1.1(b)(1), however, the district court disregarded this undisputed evidence of

payments. Instead, the district court simply found that the defendants' conduct relating to the BDA charges had resulted in a loss of $649,090.87, the precise amount that had been removed from the Trans Pacific account. Tr. 3355.

On December 13, 1996, the district court sentenced Mr. Riley to 108 months in prison and Ms. Coon to 87 months in prison. The final judgment and commitment orders were entered on February 21, 1997, and the petitioners filed timely notices of appeal.

3. Petitioners' Appeal

In their appeal to the United States Court of Appeals for the Eighth Circuit, the petitioners argued, *inter alia*, that the district court's refusal to allow defense counsel to cross-examine Messrs. Trigueiro and Hyde regarding their financial interests in the issues at stake in the criminal proceedings violated the Confrontation Clause of the Sixth Amendment. Petitioners also contended that the district court's refusal to consider the undisputed repayment evidence in calculating the amount of "loss" attributable to the defendants' fraud-related offenses constituted an abuse of discretion and required that their sentences be vacated.

In response to the petitioner's Sixth Amendment challenge, the government argued only that the district court's restrictions on cross-examination were proper. *See* Government Brief on Appeal at 64-68. The government never contended that the restrictions on cross-examination were harmless beyond a reasonable doubt.

4. The Eighth Circuit's Opinion

In rejecting the petitioners' constitutional challenge to the restrictions placed on their cross-examination of

Messrs. Hyde and Trigueiro, the Eighth Circuit ignored the government's unambiguous waiver of any harmless error argument. Instead, the Eighth Circuit held summarily that "[a]fter a review of the record, we conclude the court did not abuse its discretion in limiting the extent of cross examination regarding CAIC civil litigation over WBA premiums and whether the WBA insurance arrangement was an ERISA trust – these issues were adequately explored throughout the trial." *See* Pet. App. A, p. 10a-11a.

The Eighth Circuit also rejected the petitioners' arguments regarding the district court's loss calculations, concluding that the district court somehow found the government's evidence "more persuasive on the issue of fraud loss." *See* Pet. App. A., p. 15a. The court of appeals explained that "later repayments do not necessarily affect the loss determination under § 2F1.1." *See* Pet. App. A, p. 14a (citing *United States v. Mills*, 987 F.2d 1311, 1315-16 (8th Cir.), *cert. denied*, 510 U.S. 953 (1993)).

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING WHEN COURTS OF APPEAL MAY ENGAGE IN *SUA SPONTE* HARMLESS ERROR REVIEW

An appellate court presented with violations of the Confrontation Clause must assure itself that the constitutional errors were "harmless beyond a reasonable doubt" before affirming a conviction. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). What is less clear is whether an appellate court is free to engage in a *sua sponte* harmless error

analysis in the absence of any government argument that the error satisfies the *Van Arsdall* test.

Federal courts of appeals around the country have reached different conclusions on this point. In *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991), the Seventh Circuit established a three-part test to be used in determining whether an appellate court should address harmlessness when the government has failed to do so. According to that test, a court should consider "[1] the length and complexity of the record; [2] whether the harmlessness of the error or errors is certain or debatable, and [3] whether a reversal would result in protracted, costly and ultimately futile proceedings in the district court." *Id.* at 227. Other federal courts of appeals have cited this test with approval. *See, e.g., United States v. Torrez-Ortega*, 184 F.3d 1128, 1136 (10th Cir. 1999); *United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n.10 (11th Cir. 1995).[6]

But while the *Giovannetti* test has obtained some significant support, some courts have raised serious questions about its formulation. For example, in *United States v. Samaniego*, 187 F.3d 1222, 1224-25 & n.2 (10th Cir. 1999), the Tenth Circuit cited the *Giovannetti* test, but noted significant "confusion about the third factor" of the test. Similarly, the First Circuit has acknowledged the *Giovannetti* test, but has declined to restrict itself to the three factors employed by the Seventh Circuit. *See United States v. Rose*, 104 F.3d 1408, 1414 (1st Cir. 1997).

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[6] Prior to its decision in this case, the Eighth Circuit had followed the *Giovannetti* test. *See, e.g., United States v. Montgomery*, 100 F.3d 1404, 1407 (8th Cir. 1996); *Lufkins v. Leapley*, 965 F.2d 1477, 1481 (8th Cir. 1992).

In *United States v. Pryce*, 938 F.2d 1343 (D.C. Cir. 1991), three different judges on the United States Court of Appeals for the D.C. Circuit expressed differing views regarding the power of appellate courts to conduct a *sua sponte* harmless error analysis. Judge Williams, writing for the court, voiced agreement with "the general approach of *Giovannetti*," although he noted that the "[t]he role of the third factor is unclear." *Id.* at 1348 & n.4 (Williams, J.). Judge Randolph's concurring opinion relies in part upon Fed. R. Crim. P. 52(a) and suggests that appellate courts may be "obligated" to conduct a harmless error review of the entire record "despite the government's failure to make a harmless error argument." *Id.* at 1350-51 (Randolph, J., concurring). Finally, Judge Silberman's dissent argues forcefully that appellate courts should *never* consider harmless error in the face of a government waiver. *Id.* at 1352-55 (Silberman, J, dissenting). Judge Silberman contends that a *sua sponte* harmless error review in the face of a government waiver compromises the fundamental principle of judicial neutrality. *Id.*

In this case, it is clear that the district court's refusal to allow any cross-examination in relating to the civil lawsuits violated the petitioners' Confrontation Clause rights. As this Court has repeatedly held, "[t]he partiality of a witness is subject to exploration at trial, and 'is always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (citations omitted). *Accord Olden v. Kentucky*, 488 U.S. 227, 233 (1988); *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985). Thus, "[a] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating

to the reliability of the witness.'" *Van Arsdall*, 475 U.S. at 680 (quoting *Davis*, 415 U.S. at 318). Here, where the district court precluded *all* questioning regarding the witnesses' financial motive to lie, a Confrontation Clause violation is plainly established.

In assessing whether a Confrontation Clause violation occurred, a court's focus "must be on the particular witness, not on the outcome of the entire trial." *See Van Arsdall*, 475 U.S. at 684. Thus, consideration of whether the witness's financial motivations were explored "throughout the trial" is relevant only to a *Van Arsdall*-harmlessness review. Accordingly, the Eighth Circuit's conclusion in this case (reached only after "review of the record," Pet. App. A, p. 10a) that "these issues were adequately explored at trial" is necessarily a finding that the Confrontation Clause violation was harmless beyond a reasonable doubt.

But it is equally clear that the government never raised any harmless error argument in its brief on appeal. To the contrary, the government argued only that the district court restrictions were legally correct. *See* Government's Brief on Appeal at 64-68. Indeed, the words "harmless error" did not appear anywhere in the government's cross-examination argument. Moreover, there is no dispute that the proceedings before the district court were extraordinarily complex, involving a five-week trial and more than 3,000 pages of transcript.

Thus, in this case, the Eighth Circuit appears to have taken the path espoused in *Pryce* by Judge Randolph: a *sua sponte* harmless error review in a complex case despite an unambiguous government waiver of the issue in its appellate brief. Indeed, the court of appeals did not consider *any* of the factors set forth in *Giovannetti*. Accordingly, the court's decision breaks not only with the views advanced by Judge

Silberman in *Pryce*, but also with the many courts of appeals which have refused to engaged in *sua sponte* harmless error review in cases involving complex trial court records. *See, e.g., Samaniego*, 187 F.3d at 1225-26 (refusing to engage in harmless error review where government did not raise issue on appeal and case involved 2,350 page record including transcript of six-day trial); *McLaughlin*, 126 F.3d at 135 (refusing to find harmless error where trial court record was "complex").

As Judge Silberman explained in his *Pryce* dissent, a basic premise of the adversarial system is that "appellate courts do not sit as self-directed boards of inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Pryce*, 938 F.2d at 1353 (Silberman, J., dissenting) (quoting *Carducci v. Regan,* 714 F.3d 171, 177 (D.C. Cir. 1983)). Accordingly, an appellate court's decision to engage in such review in the absence of any government prompting to do so undermines the principle of neutrality upon which our judicial system is based. *Pryce*, 938 F.2d at 1354-55 (Silberman, J., dissenting). The Eighth Circuit's decision to do so in this complex criminal case—without even employing the limiting tests adopted by other federal courts of appeals—creates a conflict among the federal courts that is by nature one that calls for resolution by this Court.

IV.

THE EIGHTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S LOSS CALCULATION AT SENTENCING ALSO MERITS REVIEW BY THIS COURT

In rejecting petitioners' argument that their payments of $674,102 to their alleged victims should have been

considered by the district court in determining the relevant amount of loss under the Sentencing Guidelines, the Eighth Circuit stated that "later repayments do not necessarily affect the loss determination under § 2F1.1." *See* Pet. App. A, p. 14a (citing *United States v. Mills*, 987 F.2d 1311, 1315 (8th Cir. 1993)).[7] This reasoning is faulty.

As an initial matter, the Eighth Circuit's decision ignores the undisputed fact that the petitioners made the repayments in 1992, approximately two years before they were indicted and well before there was any threat of legal action against them. *See* DX 120. While federal courts have affirmed loss determinations that disregard repayments to victims, they have generally done so only where the repayments are designed to conceal an ongoing fraudulent scheme (*see United States v. Morris*, 18 F.3d 562, 570 (8th Cir. 1994)), or where the repayments occurred *after* discovery of the defendants' wrongful scheme. *See e.g., United States v. Brekke*, 152 F.3d 1042, 1046 (8th Cir. 1998) (refusing to consider defendants' repayment "in light of the fact that their repayment was in response to legal action taken by [the victim]"); *United States v. Mummert*, 34 F.3d 201, 204 (3d Cir. 1994) ("A defendant in a fraud case should not be able to reduce the amount of loss for sentencing

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[7]The Eighth Circuit's statement that the district court simply found the government's loss evidence "more persuasive" than the petitioners' repayment evidence misapprehends the nature of the evidentiary presentations at the sentencing hearing. At that hearing, there was *no* dispute regarding the removal of the $649,090 from the Trans Pacific Account, and there was *no* dispute regarding the petitioners' subsequent repayments of $674,102. Accordingly, these were not competing pieces of evidence such that the district judge could deem one evidentiary presentation "more persuasive" than the other. Rather, the evidence–taken together–established a single sequence of events: the petitioners' removal of funds from the account, followed by the petitioners' voluntary repayment of an approximately equal amount to their alleged victims.

purposes by offering to make restitution after being caught."). Indeed, the decision cited by the Eighth Circuit to support its position involved a defendant who repaid his victims "only reluctantly in response to threats of legal action." *Mills*, 987 F.2d at 1316. In this case, there was no evidence (and the district court did not find) that the defendants' repayments were designed to conceal their alleged scheme, and the undisputed evidence demonstrated that the repayments were made well before the defendants' conduct was challenged.[8]

More importantly, the Eighth Circuit's opinion in this case conflicts directly with the opinions of several other courts of appeals that have held that, in calculating loss under U.S.S.G. § 2F1.1, sentencing courts *must* consider repayments made before discovery of a defendant's scheme. *See, e.g., United States v. Becker*, 9 F.3d 452, 454 (6th Cir. 1993) (reversing district court for refusing to consider the amount of a repayments made by a defendant "prior to the discovery of the fraud"); *see also United States v. Stoddard*, 150 F.3d 1140, 1146 (9th Cir. 1998) (explaining that amounts repaid to victim "prior to discovery of the offense" should be considered in calculating actual or intended loss); *United States v. Houlisa*, 13 F.3d 1043, 1046 (7th Cir. 1994) ("[T]he full amount involved is not considered if the defendant both intended to and did return part of that amount before detection of his scheme").

A conflict among the circuits regarding the proper application of the amount of loss calculation under § 2F1.1 is

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[8] Notably, the district court did not base its rejection of the repayment evidence on any finding that the repayments had not been made. To the contrary, the district court specifically acknowledged that the repayments had been made, but simply refused to consider them in its loss calculations. *See* Tr. 3636 ("It is clear from the record of the defendants' own evidence that they paid a million dollars in claims.").

a dispute that merits resolution by this Court. Section 2F1.1 among the most important and widely used provisions in the United States Sentencing Guidelines. The application and proper interpretation of this provision, which has a direct and significant impact on the liberty of affected citizens, should not be subject to accidents of geography.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 29, 1999

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

CHERYLL S. COON, Defendant - Appellant.

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

FERRELL TRAVIS RILEY,
Defendant - Appellant.

No. 97-1652, No. 97-1665, No. 97-2886

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

187 F.3d 888; 1999 U.S. App. LEXIS 17782

July 28, 1999, Filed

Before LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

LOKEN. Circuit Judge:

Following a five week jury trial, Ferrell Travis Riley and Cheryll S. Coon were convicted of violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) ("RICO"), by committing seven predicate acts of racketeering, five of which were separately charged. Riley was also convicted of three counts of fraud in violation of 18 U.S.C. § 2314; six Travel Act and conspiracy charges relating to the attempted bribery of an insurance commissioner and bribery of a Maryland state employee, see 18 U.S.C. §§ 371 and 1952; and one charge of obstruction of justice in violation of 18 U.S.C. § 1510. Coon was convicted of all charges except bribery of the Maryland employee. The district court[1] sentenced Riley and Coon to 108 and 87 months in prison, three years of supervised release with a special condition barring self-employment, and the payment of $850,590 in restitution. After a second trial, the jury returned forfeiture verdicts against both defendants. On appeal, Riley and Coon argue insufficiency of the evidence, newly discovered evidence, district court bias, erroneous evidentiary rulings, instructional errors, and sentencing errors. We affirm.

I. Background and Sufficiency of the Evidence

Beginning in the late 1980s, Riley and Coon created four companies to sell surplus lines insurance and provide insurance related services -- Meadowlark Insurance Company, Commercial Indemnity Assurance Company, M&M Management Company, and Magnolia Acceptance Corporation, a premium finance company. These companies were collectively the alleged RICO enterprise. Riley

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[1] The HONORABLE JOSEPH E. STEVENS, JR., United States District Judge for the Western District of Missouri, who to our great regret has died since completing the trial and sentencings in these cases.

effectively ran the enterprise. Coon controlled financial affairs, usually as company president. After regulators ran the insurance companies out of several States, Riley and Coon settled them in Missouri.

The trial focused on defendants' insurance activities in the early 1990s. Marketing surplus lines insurance in California, Riley and Coon collected premiums and then used the funds for other purposes, leaving numerous unpaid insurance claims and forcing corporate victims into insolvency. The government charged Riley and Coon with fraud together with bribery and obstruction offenses that constituted a pattern of racketeering activities. Defendants maintained that state insurance regulators were biased against them because they sold surplus lines, unregulated types of insurance usually provided by off-shore companies to insure high risks that licensed domestic insurers avoid. The jury found the government's charges valid beyond a reasonable doubt. We first discuss defendants' challenges to the sufficiency of the evidence, viewing that evidence in the light most favorable to the verdict and upholding a count of conviction if a reasonable jury could have found defendant guilty beyond a reasonable doubt. See *United States v. Johnson*, 56 F.3d 947, 956 (8th Cir. 1995).

A. The WBA Fraud. In April 1991, Commercial Acceptance Insurance Company ("CAIC") agreed that Meadowlark would sell surplus lines liability insurance under CAIC's name, with Meadowlark insuring the risks but paying 7 1/2 % of the premiums to CAIC. Though CAIC's principals explained it was not licensed to sell health insurance, Riley and Coon as authorized agents of CAIC signed a contract to provide health insurance to members of the Western Businessmen's Association ("WBA"). Between August and November 1991, WBA members paid over $1,000,000 in health care premiums that were deposited into a "M&M Management Corp. Trust Account" at the

TransPacific Bank in Alameda, California. Coon transferred $649,000 out of this account, and defendants then used those funds for unrelated expenses, including bribes, personal investments, and the purchase of an insurance company. In October, CAIC learned that its name was being used to underwrite health insurance and withdrew Meadowlark's authority. In December, Riley and Coon transferred the claims files from California to Kansas City. Insureds were told that claims would not be paid in full because all premiums had not been paid.

For this scheme, the jury convicted Riley and Coon of two counts of knowingly transporting in interstate commerce property "stolen, converted or taken by fraud." 18 U.S.C. § 2314. Each count focused on one transfer of funds from the TransPacific account. Riley and Coon argue the government failed to prove they stole or converted these funds because the account functioned as a simple business checking account in which they were the only authorized signatories. Defendants presented evidence that insurance companies pay claims from general operating assets, rather than holding collected premiums in trust for that purpose, and they argued there was no legal restriction on their use of monies in the TransPacific account. Leaving aside the fact that M&M signed a contract promising "that all [WBA] premiums collected shall be deposited promptly in a fiduciary bank account in the name of Insurer at TransPacific Bank," defendants' argument ignores the government's proof they violated § 2314 because the funds in the TransPacific account were initially "taken by fraud."[2] Even if M&M

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[2] Proof that the premium funds were taken by fraud is sufficient because, "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any

owned the funds in the account, title is not a defense if the funds were procured by fraud. See *Gay v. United States*, 408 F.2d 923, 926-27 (8th Cir.), *cert. denied*, 396 U.S. 823 (1969). Witnesses from the other parties to these transactions testified that defendants represented they were authorized to write health insurance on behalf of CAIC, knowing CAIC was not licensed to write health insurance. Riley and Coon agreed to set up a trust fund with the premiums to pay WBA members' health care claims, and then used over $649,000 of premium payments for other purposes, implementing their scheme with the two wire transfers charged in these counts. This evidence was sufficient to convict Riley and Coon of violating § 2314.

B. The IAC Fraud. The third fraud count concerned a separate scheme in which the predecessor to Meadowlark, which was not qualified to sell surplus lines insurance in California, undertook to provide malpractice insurance for members of the International Association Coalition ("IAC"), a group of podiatrists formed in California. The agreement provided that M&M Management would deposit thirty percent of the premiums into a segregated trust account "for the payment of claims losses and loss adjustment expenses only." Disbursements from the account required two signatures, Coon as representative of M&M, and Dr. Wener for IAC. Riley moved the account and removed the IAC signature requirement. Coon then made interstate transfers of $201,000 out of the trust account for non-related uses. The jury convicted Riley and Coon of violating § 2314 by making interstate transfers of $50,000 out of the trust account for IAC premiums. Defendants argue the evidence was insufficient for this conviction because IAC's interest in the premiums reverted to defendants' enterprise when IAC

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one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 (1970).

failed to pay all premiums owing. However, as the district court noted in denying their motion for judgment of acquittal, the two-signature requirement was an incident of IAC's ownership interest in the account. In addition, Dr. Wener testified that the insurer was only entitled to trust funds remaining after all claims were paid, and a claims reviewer testified that over $140,000 in loss reserves were outstanding at the time of the transfers. This was sufficient evidence that the transfers of these funds violated § 2314.

C. The Missouri Bribery Scheme. Riley and Coon were each convicted of four substantive violations of the Travel Act, and of conspiring to violate that Act, for making four interstate transfers totaling $290,000 with intent to bribe the Missouri Commissioner of Insurance.[3] It is undisputed defendants made four transfers totaling $290,000 to bank accounts in Jefferson City. Riley and Coon argue the government failed to connect these payments to a bribery scheme.

Meadowlark applied to the Missouri Department of Insurance for a license to sell surplus lines insurance. In December 1990, an examiner opined that its financial condition was inadequate. Robert Weller, a business associate of Kansas City attorney Kevin Hare, testified that in April 1991, Hare and Raymond Sermon hired Weller to make scripted telephone calls. Beginning in May, Weller met with Hare and Sermon four times to receive telephone calls from Riley. Each time, Hare would receive a call from Riley

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[3] As relevant here, the Travel Act prohibits the intentional use of a facility in interstate commerce to distribute the proceeds of or to otherwise promote enumerated unlawful activities that include bribery. See 18 U.S.C. § 1952. Conspiracy to violate the Travel Act is a violation of 18 U.S.C. § 371.

and turn the phone over to Weller, who posed as the Missouri Commissioner of Insurance and worked off a script prepared by Hare and Sermon. In the first conversation, Weller "discussed the possibility of getting [Riley] licensed to write insurance in Missouri." In the three subsequent conversations, Weller as Commissioner said he could get the application through and demanded that Riley pay specific amounts of money. After the last conversation, Weller accompanied Hare and Sermon to a bank in Jefferson City where they received money and paid Weller his fee. Hare and Sermon kept the money transferred by Riley and Coon, and the Missouri Insurance Department eventually denied Meadowlark's license application. Weller received a total of $11,000 from Hare for helping swindle Riley and Coon out of the money. Weller ultimately pleaded guilty to tax fraud, and Hare was convicted of fraud for his role in the scheme. See *United States v. Hare*, 49 F.3d 447 (8th Cir.), *cert. denied*, 516 U.S. 879 (1995). Riley testified that in March 1991, he accepted Hare's offer to help with the Meadowlark licensing process. According to Riley, Hare then used his substantial political connections to help Meadowlark obtain a license, and Riley had Coon make four transfers totaling $290,000 to bank accounts in Jefferson City specified by Hare.

On appeal, Riley argues there was insufficient evidence that the first transfer of $60,000 was made with intent to facilitate bribery. Coon argues the evidence against her was insufficient as to all four transfers. Both claim the government failed to prove any acts in furtherance of the attempted bribery after the wire transfers, as 18 U.S.C. § 1952(a)(3)(A) requires. We disagree. Viewing the evidence in the light most favorable to the verdict, a reasonable jury could find that defendants made each transfer with the requisite intent to further a scheme to bribe the Commissioner. Weller testified to four phone calls; Riley and Coon made four payments. Weller specifically

demanded bribes in the last three calls, and bribes were paid; the jury could deduce that the payment made after the first call was also made with intent to bribe. There was also sufficient evidence that Coon knowingly aided and abetted the bribery scheme -- she transferred the money to the Jefferson City accounts, and she later made damaging admissions in a taped meeting with Riley and a former employee and government witness named James Wining. Finally, there was sufficient evidence of acts in furtherance of the bribery scheme after the transfers. There were phone calls from Coon's residence to Hare's hotel room in Jefferson City after the transfers. Riley met with Hare in October 1992 in an effort to recover the money. And a year after the transfers, Hare cooperated with the government and taped conversations in which Riley said he would never tell anyone about their deal, reassured Hare that the authorities would not bother Weller, and advised Hare how to report the money for tax purposes. Efforts to hide involvement in a bribery scheme constitute "thereafter acts" under the statute. See *United States v. Admon*, 940 F.2d 1121, 1125 (8th Cir. 1991).

D. The Obstruction of Justice. James Wining was a Meadowlark employee who helped incorporate Meadowlark in the Dominican Republic and helped Coon prepare unreliable financials for an affiliated insurer. On March 17, 1992, Wining quit Meadowlark, pleaded guilty to fraud charges, and began cooperating with the on-going investigation of Riley and Coon. Between March and November 1992, Riley made bi-weekly payments to Wining totaling about $25,000. M&M reimbursed Riley, and Coon had an IRS Form 1099 prepared for Wining. Wining taped conversations with Riley in which they discussed the FBI investigation. Wining testified that the payments from Riley were to "keep his mouth shut." Riley and Coon were convicted of violating 18 U.S.C. § 1510 (obstruction of

justice) for paying Wining to withhold information from federal investigators.

On appeal, Coon challenges the sufficiency of the evidence to convict her of this charge, arguing that Riley made the payments and there is no evidence Wining ever spoke to her about a federal investigation. However, Coon was present at a tape recorded meeting when Wining and Riley discussed Wining's cooperation. She was financially responsible for M&M, which reimbursed Riley for the payments and prepared a Form 1099 for Wining. Viewing the evidence in the light most favorable to the verdict, a reasonable jury could find that Coon knew Riley was paying Wining to prevent harmful disclosures to federal investigators, and that she aided and abetted the offense by causing M&M to cover up the true nature of the payments.

E. The RICO Conviction. To convict defendants of a RICO violation, the government must prove they participated in the conduct of an enterprise through a pattern of racketeering activity. See 18 U.S.C. § 1962(c); *United States v. Bennett*, 44 F.3d 1364, 1374 (8th Cir.), *cert. denied*, 515 U.S. 1123 (1995). Riley and Coon argue the government failed to prove the predicate racketeering activities. Four of the seven alleged predicate acts were the separately charged fraud, Travel Act, and obstruction of justice offenses we have already discussed. There was sufficient evidence to convict Riley and Coon of those separate offenses. That is sufficient evidence they engaged in a pattern of racketeering activity supporting their RICO convictions. See *United States v. Cardall*, 885 F.2d 656, 682 (10th Cir. 1989).[4]

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[4] RICO defines "racketeering activity" to include violations of 18 U.S.C. §§ 2314, 1952, and 1510. See 18 U.S.C. § 1961(1).

F. Denial of New Trial for Newly Discovered Evidence. Riley and Coon moved for a new trial, alleging that newly discovered bank records show that payments totaling $674,102 were made to WBA claimants from M&M's Kansas City account in 1992. The district court denied the motion because this evidence would not have affected the outcome of the WBA fraud conviction and was cumulative to other trial evidence. We agree. Whether defendants decided after collecting the WBA premiums to honor part of their obligations to insureds does not weaken the government's proof that the premiums were initially "taken by fraud," Moreover, the alleged new evidence was cumulative because Riley testified at trial that he paid over $1,000,000 to satisfy WBA claims. The district court may grant a new trial "if the interest of justice so require." Fed. R. Crim. P. 33. There was no clear abuse of the court's discretion when it denied defendants' motion for new trial. See *United States v. Castillo*, 171 F.3d 1163, 1167 (8th Cir. 1999) (standard of review).

II. Evidentiary Issues

A. Limits on Defense Cross Examination. Defendants next contend that their convictions must be reversed because the district court unfairly limited their cross-examination of three prosecution witnesses. Although the Sixth Amendment's Confrontation Clause guarantees defendants an opportunity for effective cross-examination, the district court retains wide latitude to impose reasonable limits. We review the limiting of cross exam for clear abuse of discretion. See *United States v. Ortega*, 150 F.3d 937, 941 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 837 (1999), citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). After careful review of the record, we conclude the court did not abuse its discretion in limiting the extent of cross examination regarding CAIC civil litigation over WBA premiums and whether the WBA insurance arrangement was an ERISA

trust -- these issues were adequately explored throughout the trial. Nor did the court abuse its discretion in controlling the way in which conversation tapes could be used during the cross examination of James Wining -- the tapes were admitted into evidence, and defense counsel played them during closing argument.

B. Evidence of the Maryland Code of Ethics. In addition to the Travel Act charges previously discussed, Riley was convicted of conspiring to violate the Travel Act by bribing the manager of the Maryland Department of Transportation's self-insurance program to approve an application in which Meadowlark would provide a surety bond and liability insurance. The government proved that Riley paid over $17,000 to this manager from June to December 1991. Riley testified this was compensation for work outside the manager's agency responsibilities. The district court precluded the government from introducing into evidence the Maryland statute and Code of Ethics prohibiting state employees from taking money from persons they regulate. However, the court permitted testimony that it was the policy of the Maryland Department of Transportation not to allow its employees to accept secondary employment from regulated persons. Riley argues this testimony unfairly prejudiced his defense. We disagree. The district court adhered to its ruling that witnesses could not refer to Maryland law. The agency's policy barring employees from accepting this kind of outside employment was obviously relevant to the issue of whether Riley's payments were bribes. The court did not abuse its broad discretion by admitting that evidence. See *United States v. Ballew*, 40 F.3d 936, 941 (8th Cir. 1994) (standard of review), *cert. denied*, 514 U.S. 1091 (1995).

C. Unfair Trial. Quoting snippets of testimony from the five-week trial, Riley and Coon argue that the district court's "actions, comments and rulings during trial were one-sided

and prejudicial to the defense resulting in a fundamentally unfair proceeding." There was no contemporaneous objection to most of the court's comments, questions, and rulings now emphasized on appeal, so those actions are reviewed for plain error. See *Williams v. Fermenta Animal Health Co.*, 984 F.2d 261, 263 (8th Cir.), *rehearing denied*, 992 F.2d 192 (8th Cir. 1993). Many occurred outside the jury's presence.

Viewing the trial record in its entirety, we conclude that Judge Stevens did not persistently interject himself on the side of the prosecution. Compare *United States v. Turner*, 975 F.2d 490, 493 (8th Cir. 1992), *cert. denied*, 506 U.S. 1082 (1993), with *United States v. Singer*, 710 F.2d 431, 436 (8th Cir. 1983). Over the course of the trial, the court made rulings adverse to both parties and asked hard questions of both prosecution and defense witnesses. The court invariably allowed defense counsel an opportunity to ask follow-up questions. The challenged rulings were appropriate efforts to control repetitive questioning, improper foundation, and the mischaracterizing by counsel of testimony or other evidence. In short, the court acted well within its discretion to control trial proceedings. See *United States v. Jackson*, 29 F.3d 397, 402-03 n.5 (8th Cir. 1994).

III. A Jury Instruction Issue

Riley and Coon defended the two counts of WBA fraud in part by contending that the funds in the TransPacific account were unrestricted and therefore defendants were free to transfer them out and use them for other purposes. The government countered with evidence the account was established as a "trust account" for the purpose of paying health insurance claims. Not surprisingly, during the trial there was much wrangling with witnesses about the significance of the trust account designation. Ultimately,

defendants proposed an instruction on California trust law. The district court refused to give that instruction, explaining:

> I am not going to give that California instruction, that really collateralizes the issue and is confusing. I don't think they need it.
>
> * * * * *
>
> I am not going to give these people a semester-long course in trust and estates as to what the law of trusts in California is.
>
> If you all can come together with some sort of a one-paragraph instruction telling them if there was, if there were special conditions on this account which were not complied with, then it was taken out of the trust account, I will go along with you. And you ought to be able to come up with something like that but I am not going to confuse them with all the details of the law of trusts.

Nothing further was proposed to the district court on this subject, but on appeal, Riley and Coon argue the district court erred in refusing to instruct on the essential elements of a trust under California law. We disagree.

The jury was properly instructed that, to convict Riley and Coon of violating 18 U.S.C. § 2314, it must find the funds were stolen, converted, or taken by fraud and thereafter moved in interstate commerce with knowledge they were stolen, converted, or taken by fraud, As we have already noted, if the funds were initially obtained by fraud, it was no defense that they were deposited in an unrestricted bank account. The government's closing argument on the WBA fraud counts emphasized that the jury should find the premium funds were obtained by fraud and later transferred

out of the account. To the extent the government's case could also be construed as charging that defendants stole or convened the funds by transferring them out of trust, the jury heard defendants' evidence there were no limitations on their use of the funds and was free to credit that evidence. Thus, the instructions provided defendants an opportunity to present their theory of the defense in closing argument. See *United States v. Risch*, 87 F.3d 240, 242 (8th Cir. 1996). The district court did not abuse its substantial discretion by refusing to give the proposed tangential and potentially confusing instruction on the California law of trusts.

IV. Sentencing Issues

A. Amount of Fraud Loss. In determining defendants' Guidelines sentencing ranges, the district court increased their base offense levels by eleven levels based on its finding that the loss caused by the WBA and IAC frauds exceeded $800,000. See U.S.S.G. § 2F1.1(b)(1). This amount included the $649,090 defendants transferred out of the TransPacific account and used for purposes other than paying WBA members' health insurance claims. Riley and Coon argue this finding is clearly erroneous because the court ignored evidence M&M paid $674,102 to or on behalf of WBA members after closing the TransPacific account. We review the district court's fraud loss findings for clear error; "as long as the determination is plausible in light of the record as a whole, clear error does not exist." *United States v. Jackson*, 155 F.3d 942, 948 (8th Cir.), *cert. denied*, 119 S. Ct. 627 (1998). The amount of fraud loss for sentencing purposes is the greater of the loss defendants intended to inflict at the time of the fraud, or the actual loss, so later repayments do not necessarily affect the loss determination under § 2F1.1. See *United States v. Mills*, 987 F.2d 1311, 1315-16 (8th Cir.), *cert. denied*, 510 U.S. 953 (1993). The finding in question was not clearly erroneous.

Defendants also argue the district court improperly shifted to them the burden of proof on this issue at sentencing. We agree the government has the burden of proving the amount of fraud loss by a preponderance of the evidence. We disagree the court shifted that burden to the defense. At trial, the government introduced bank records showing that $649,090 of the $1,058,066 deposited in the TransPacific account was withdrawn by defendants in 1991 for purposes other than the payment of health care claims. At sentencing, the court admitted defendants' evidence of payments totaling $674,102 made to WBA claimants in 1992. Simply because the court found the government's evidence more persuasive on the issue of fraud loss does not mean it improperly shifted the burden of proof on this issue.

B. An Ex Post Facto Clause Issue. The district court applied § 2F1.1(b)(3)(B) of the 1995 Guidelines (now § 2F1.1(b)(4) of the current Guidelines) to increase defendants' base offense levels because they violated cease and desist orders entered against them in 1990 and 1991. Riley and Coon argue that adjustment violates the Ex Post Facto Clause. We disagree. Section 2F1.1 was the proper guideline to apply in determining the base offense levels for defendants' violations of 18 U.S.C. § 2314, and § 2F.1.1(b)(3) in the 1990 Guidelines contained the exact same upward adjustment.

C. Role in Offense. The district court imposed role-in-the-offense upward adjustments of four levels for Riley (organizer or leader) and three levels for Coon (manager or supervisor). See U.S.S.G. § 3B1.1. The court specifically found that defendants and five other persons were criminally responsible participants in the RICO offense. On appeal, Riley and Coon argue these findings are clearly erroneous. We agree with the Seventh Circuit that the § 3B1.1 adjustment is applied to a RICO offense by looking at the overall RICO conspiracy and all its relevant conduct. See

United States v. Damico, 99 F.3d 1431, 1435-38 (7th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997). Viewing the record in that light, the district court's findings that Riley, Coon, and the five other named individuals were criminally responsible for the enterprise's pattern of racketeering activities are not clearly erroneous. See *United States v. Braun*, 60 F.3d 451, 453 (8th Cir. 1995). We also reject Coon's contention there was no evidence she played a managerial or supervisory role in the offense. She had managerial responsibility for the financial affairs of the extensive RICO enterprise.

D. Upward Departure. The district court imposed upward departures of two levels for each defendant under U.S.S.G. § 5K2.0 based upon the unusual amount of fraud loss and the large number of fraud victims. Riley and Coon argue the court erred by relying on factors already taken into account in the Guidelines. We review the sentencing court's decision to depart under a "unitary abuse of discretion standard" and defer to the court on the critical issue of "whether a given factor is present to a degree not adequately considered by the Commission." *Koon v. United States*, 518 U.S. 81 (1996); see *United States v. Washington*, 109 F.3d 459, 462 (8th Cir. 1997).

An upward departure is specifically encouraged if the loss calculated under § 2F1.1(b)(1) "does not fully capture the harmfulness and seriousness of the conduct," such as when the offense involves "the knowing endangerment of the solvency of one or more victims" or causes "reasonably foreseeable, physical or psychological harm." U.S.S.G. § 2F1.1, comment. (n.10(c), (f)) (1995). Here, the court heard testimony from health insurance claimants whose medical bills were never paid in full about the consequences of those non-payments. The court heard evidence that the insurance companies controlled by defendants became insolvent. It found that defendants' actions caused

$5,000,000 in debts to CAIC, $13,000,000 in debts owed by their companies, and at least $1,000,000 in unpaid insurance claims with resulting "emotional harm to sick and debilitated individuals." On this record, the upward departures were not an abuse of the court's sentencing discretion.

E. Condition of Supervised Release Banning Self-employment. We also conclude that the district court did not abuse its discretion in imposing as a special condition of supervised release that Riley and Coon "shall not be self-employed during the term of supervised release;" In light of defendants' long-standing and extensive pattern of criminal racketeering activities, a prohibition against self-employment during supervised release is a restriction reasonably necessary to protect the public. See U.S.S.G. § 5F1.5(2); *United States v. Choate*, 101 F.3d 562, 566 (8th Cir. 1996).

F. Restitution. The criminal judgments require both Riley and Coon to pay restitution in the amount of $649,090 to CAIC. They argue those orders must be reversed because of insufficient evidence that CAIC was a fraud victim, or that CAIC suffered a loss. As we have explained in affirming the WBA fraud convictions and the findings as to amount of fraud loss, there was sufficient evidence in the record to affirm the restitution orders.

V. Alleged Judicial Bias

Prior to trial, the district court appointed John C. Craft as monitor and then receiver of Meadowlark and other companies previously controlled by Riley and Coon whose assets were allegedly subject to criminal forfeiture under RICO. See 18 U.S.C. § 1963(a). We subsequently vacated these portions of the court's pre-conviction restraint orders. See *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996). On the eve of trial, Riley and Coon objected to Judge Stevens presiding at trial because the court had worked at the same

law firm with Craft, was a social friend of Craft, and had ex parte communications with Craft as monitor and receiver, and because Craft was on the government's witness list and the criminal forfeiture count might ultimately be tried to the court. The court denied this request, explaining he was associated with Craft in the practice of law for about one year in the late 1960s, they saw each other socially only occasionally and not at all since Craft's appointment, the court had had no ex parte communications with Craft regarding the case, and Craft was appointed because "he is one of the two lawyers in Kansas City best qualified and experienced as insurance . . . monitor or receiver."

On appeal, after an intemperate preamble attacking Judge Stevens's integrity and fairness, Riley and Coon argue that the Judge committed reversible error by declining to recuse himself under 28 U.S.C. § 455. They do not assert that Judge Stevens had a conflict of interest mandating recusal under § 455(b) because of his prior relationship with Craft, the issue they raised in the district court. Rather, they argue Judge Stevens should have recused under § 455(a) because "his impartiality might reasonably be questioned." That issue was not raised in the district court. Therefore, it is waived -- "claims under [§ 455] will not be considered unless timely made." *Holloway v. United States*, 960 F.2d 1348, 1355 (8th Cir. 1992); accord *Polizzi v. United States*, 926 F.2d 1311, 1321 (2d Cir. 1991).

In addition, the contention is plainly without merit. Immediately after this court vacated the district court's receivership order, Judge Stevens held a pre-trial conference at which Craft as receiver raised the question whether his fees should be paid by the government, which had sought the ill-fated receivership, or the receivership estate. Judge Stevens commented that this issue "would come out in the wash in the long run when a determination is made as to forfeiture." Defendants argue this off-hand comment

indicates the court was predisposed to convict. Section 455(a) "deals with the objective appearance of partiality." *Liteky v. United States*, 510 U.S. 540, 553 n.2 (1994) (emphasis in original). Neither that comment nor any other comment or action by Judge Stevens during these lengthy proceedings reflects the kind of deep-seated favoritism or antagonism requiring recusal under § 455(a).

VI. The Appeals from Preliminary Forfeiture Orders

Two days after the jury's verdict in the primary criminal trial, the district court tried the government's criminal RICO forfeiture charges to the jury, which returned a verdict forfeiting defendants' interests in the RICO enterprise companies and their proceeds from racketeering activities. Nine to twelve months later, the court issued a series of "Preliminary Forfeiture Orders" based on the jury's forfeiture verdict. Riley and Coon appeal the sufficiency of the evidence underlying those orders, referring to them as forfeiture "judgments." Rule 32(d)(2) of the Federal Rules of Criminal Procedure, adopted in 1996, provides that the district court may enter a preliminary order of forfeiture following a verdict that property is subject to forfeiture. In such cases, "at sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment." When that is done, and defendant appeals from the judgment, prior case law would suggest that the preliminary order of forfeiture is an appealable part of the judgment. See, e.g., *United States v. Pelullo, 178 F.3d 196, 1999 WL 330422*, at *6 (3d Cir. 1999); *United States v. Christunas*, 126 F.3d 765, 768-69 & n.1 (6th Cir. 1997). In this case, however, the judgments in defendants' criminal cases do not refer either to the jury's forfeiture verdict or to any preliminary forfeiture order. The preliminary forfeiture orders themselves are not judgments, and they do not purport to be final orders. As defendants and the government have neither provided us with final orders in the bifurcated forfeiture proceedings, nor

explained why the preliminary forfeiture orders are appealable, we dismiss this portion of the appeals for lack of jurisdiction. See *United States v. Casas*, 999 F.2d 1225, 1231-32 (8th Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994).

VII. The Appeal in No. 97-2886

In November 1994, the district court entered preconviction restraining orders on assets of the RICO enterprise that the government asserted were subject to RICO forfeiture.[5] In November 1996 and March 1997, long after the criminal trial, the district court issued orders amending these restraining orders to the extent they impeded John Craft in his new capacity as insurance company liquidator operating under orders of a Missouri state court. Riley appeals these orders as procedurally improper. We have jurisdiction under 28 U.S.C. § 1292(a)(1) to review an order modifying an asset restraining order issued in a RICO conspiracy prosecution. See *United States v. Floyd*, 992 F.2d 498, 500 (5th Cir. 1993).

When the November 1996 and March 1997 orders were issued, Riley's interests in the companies comprising the RICO enterprise had been forfeited, at least preliminarily. Thus, we have difficulty perceiving how he has standing to challenge these orders. See *Pelullo,* 1999 WL 330422, at *6-7. More significantly, while noting that the November 1996 order was inadvertently filed without notice to Riley, the district court explained in the March 1997 order that any interest Riley may have in the assets to which liquidator Craft was given access was adequately protected by the provision preserving Riley's right to assert "offsets against or

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[5] See our opinion in Riley I for further background and the legal principles governing this aspect of the pretrial proceedings.

credits toward the satisfaction of any forfeiture orders or judgments entered in this case. "We agree and therefore affirm the orders in question. In addition, we note that to the extent this issue may be intertwined with the interlocutory forfeiture orders, as to which we have no jurisdiction, it may be reviewable when a final forfeiture order or judgment is entered.

The judgments and orders of the district court are affirmed except that the attempted appeals from the district court's preliminary forfeiture orders are dismissed for lack of jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1652WMKC

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and for
	*	Rehearing En Banc
	*	
Cheryll S. Coon,	*	
	*	
Appellant.	*	

Nos. 97-1665/2886WM

United States of America,	*	
	*	
Appellee,	*	
	*	
vs.	*	
	*	
Ferrell Travis Riley,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

August 31, 1999

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
FEB 17 2000
CLERK

(2)

No. 99-920

In the Supreme Court of the United States

FERRELL TRAVIS RILEY AND CHERYLL S. COON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals held that limitations imposed by the district court on the cross-examination of certain government witnesses was harmless error, and, if so, whether the court permissibly relied on a finding of harmlessness even though the government did not explicitly make such an argument in its brief on appeal.

2. Whether the district court committed clear error at sentencing in calculating the amount of loss attributable to petitioners under Sentencing Guidelines § 2F1.1.

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In the Supreme Court of the United States

No. 99-920

FERRELL TRAVIS RILEY AND CHERYLL S. COON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 187 F.3d 888.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1999. A petition for rehearing was denied on August 31, 1999 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on November 29, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a joint jury trial in the United States District Court for the Western District of Missouri,

petitioner Riley was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); three counts of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. 2314; six counts of violating the Travel Act or of conspiring to commit same, in violation of 18 U.S.C. 371 and 1952; and one count of obstructing justice, in violation of 18 U.S.C. 1510. Petitioner Coon was convicted on the same charges, with the exception of one Travel Act count on which she was acquitted. Pet. App. 2a. Petitioner Riley was sentenced to 108 months' imprisonment, to be followed by three years' supervised release. *Ibid.* Petitioner Coon was sentenced to 87 months' imprisonment, also to be followed by three years' supervised release. *Ibid.* The district court further ordered the payment of $850,590 in restitution. *Ibid.* The court of appeals affirmed. *Id.* at 1a-21a.

1. Petitioners' convictions arose out of their operation of four companies that sold insurance and provided insurance-related services. Pet. App. 2a-3a. Petitioners marketed and sold insurance policies, collected premium payments on those policies, and then used the funds for other purposes, leaving numerous insurance claims unpaid and forcing corporate victims into insolvency. *Id.* at 3a.

The evidence at trial established that in April 1991, petitioners' company, "Meadowlark Insurance," entered into an agreement with Commercial Acceptance Insurance Company (CAIC) pursuant to which Meadowlark undertook to sell insurance under CAIC's name. Although CAIC's principals explained to petitioners that CAIC was not licensed to sell health insurance, petitioners, acting as authorized agents of CAIC, signed a contract to provide health insurance to members of the

Western Businessmen's Association (WBA). *Ibid.* Between August and November 1991, WBA members paid more than $1,000,000 in health insurance premiums that were deposited into a trust account at the TransPacific Bank in Alameda, California. *Id.* at 3a-4a. Petitioner Coon later withdrew $649,000 from the TransPacific account, closed the account, and used the withdrawn funds for unrelated purposes including bribes, personal investments, and the purchase of another insurance company. *Id.* at 4a. In October 1991, CAIC learned that petitioners were using its name to underwrite health insurance policies. CAIC therefore withdrew Meadowlark's authority to act as its agent. *Ibid.*

The evidence at trial also established that petitioners, through an entity they formed called M&M Management, undertook to provide medical malpractice insurance for a group of podiatrists called the International Association Coalition (IAC). Petitioners transferred more than $200,000 in premiums paid for that insurance into unrelated accounts in other States, and used the funds for unrelated purposes. Pet. App. 5a.

The evidence further showed that petitioners diverted $290,000 in insurance premiums to certain bank accounts in Missouri, in an attempt to bribe the Missouri Commissioner of Insurance into helping petitioners obtain a Missouri insurance license for Meadowlark. Pet. App. 6a. Petitioners also obstructed justice by making payments totaling $25,000 to James Wining, a former business associate, in an effort to bribe him to "keep his mouth shut" about petitioners' various fraudulent and otherwise unlawful activities. *Id.* at 8a-9a.

2. At trial, the government's evidence included the testimony of Michael Trigueiro and John Hyde. Trigueiro, a former CAIC executive, testified that

petitioners exceeded the scope of their authority as agents of CAIC when they committed CAIC to providing health insurance for WBA members. Hyde, a former executive of a company that administered health benefits plans, testified about agreements between that company and petitioners. Defense counsel cross-examined both Trigueiro (Tr. 46-95) and Hyde (Tr. 209-324) at great length, but the district court sustained the government's objections to questions concerning civil lawsuits brought against Trigueiro and Hyde by members of the WBA. Tr. 94-95, 300-301.

At sentencing, the district court imposed an eleven-level increase in petitioners' offense levels under the Sentencing Guidelines, based on its finding that petitioners had caused losses in excess of $800,000. See Pet. App. 14a. That amount included the $649,090 that petitioners transferred out of the TransPacific account and had used for purposes other than paying WBA members' health insurance claims. *Ibid.* It did not reduce the amount of loss by the amount of insurance claim payments petitioners allegedly made to WBA members after closing the TransPacific account.

3. The court of appeals affirmed. As to the district court's limitation of petitioners' cross-examination of the government witnesses, the court noted that "[a]lthough the Sixth Amendment's Confrontation Clause guarantees defendants an opportunity for effective cross-examination, the district court retains wide latitude to impose reasonable limits." Pet. App. 10a (citing, *inter alia*, *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)). The court found no Confrontation Clause violation, concluding that the district court "did not abuse its discretion in limiting the extent of cross-examination regarding CAIC civil litigation over WBA premiums

* * *—these issues were adequately explored throughout the trial." *Id.* at 10a-11a.

The court of appeals also rejected a variety of sentencing claims raised by petitioners. See Pet. App. 14a-17a. The court held that petitioners' contention that they paid $674,102 to, or on behalf of, WBA members after they closed the TransPacific account did not render the district court's loss determination clearly erroneous. See *id.* at 14a. The court explained that for sentencing purposes, the amount of loss "is the greater of the loss defendants intended to inflict at the time of the fraud, or the actual loss, so later repayments do not necessarily affect the loss determination." *Ibid.*

ARGUMENT

Petitioners contend that the court of appeals' rejection of their Confrontation Clause argument was premised on a finding of harmless error. They assert that by making such a finding even though the government did not argue harmless error, the court exacerbated a conflict among the courts of appeals over whether, and under what circumstances, a court may engage in a "*sua sponte* harmless error analysis." Pet. 11-12. Petitioners further argue that the court of appeals erred in holding that the district court need not have considered alleged repayments made by petitioners to their fraud victims when calculating how much loss petitioners caused under Section 2F1.1 of the Sentencing Guidelines. Petitioners' contentions are without merit, and do not warrant this Court's review.

1. a. Contrary to petitioners' assertions (Pet. 14), the court of appeals did not premise its rejection of their Confrontation Clause argument on a finding of harmless error. Rather, the court held that the district court did not abuse its discretion in limiting petitioners'

cross-examination of Trigueiro and Hyde. Pet. App. 10a-11a.

A criminal defendant's Sixth Amendment right to confront witnesses against him by cross-examination is not unlimited. Rather, the scope of cross-examination is subject to control by the trial judge, who may impose limits on defense counsel's inquiry into the potential bias of a prosecution witness. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). As this Court explained in *Van Arsdall*, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid*; see *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.").

Applying that rule, the court of appeals in this case held that "the [district] court did not abuse its discretion in limiting the extent of cross-examination" of Trigueiro and Hyde, because the issues on which petitioners sought cross-examination "were adequately explored throughout the trial." Pet. App. 10a-11a. Specifically, the court of appeals concluded that the district court was within its discretion in sustaining the government's objection to cross-examination regarding insurance-related lawsuits brought by WBA members against Trigueiro and Hyde.[1] *Id.* at 10a. Thus, contrary

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[1] Petitioners do not purport to challenge the merits of the court of appeals' determination that the district court was within its

to petitioners' description (Pet. 14), the court of appeals did not find that the district court erred in restricting cross-examination. Having found no error, the court had no occasion to engage in a harmless error analysis.

Petitioners assert that the court of appeals' reference to the exploration of the pertinent financial issues "throughout the trial," Pet. App. 11a, was necessarily a harmless error finding because the Confrontation Clause inquiry focuses on individual witnesses rather than on "the outcome of the entire trial." Pet. 14 (quoting *Van Arsdall*, 475 U.S. at 680). Petitioners misconstrue the court of appeals' holding on this point. The court did not assess the balance of evidence presented throughout the trial. Rather, it considered whether the specific issues petitioners sought to draw out on cross-examination had already been adequately explored and developed before the jury. See Pet. App. 10a-11a. The court of appeals' analysis therefore focused on evidence relevant to the testimony of specific witnesses, rather than on the strength of the government's case overall. In light of the issues that had already been developed in the course of those witnesses'

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discretion in limiting petitioners' cross-examination on this point. See Pet. i (not listing that issue among the questions presented). To the extent petitioners do mean to challenge the merits of that determination, the factbound nature of the issue renders it inappropriate for this Court's review.

We note, however, that there was evidence before the jury that petitioners' actions had adverse financial consequences for CAIC and Trigueiro. See Tr. 45, 165-167. Thus, the jury heard evidence regarding Trigueiro's purported motive to testify against petitioners, and petitioners are incorrect that "the district court precluded *all* questioning regarding the witnesses' financial motive to lie." Pet. 14. It was within the district court's discretion to limit further exposition of that point.

testimony, the court held that the district court was within its discretion in limiting the cross-examination of those witnesses.

b. Even if the court of appeals' decision could be construed as premised on a finding of harmless error, the decision is not at odds with any decision of this Court or any other court of appeals. All the courts of appeals that have addressed the issue have concluded that appellate courts may, in their discretion, consider whether an error was harmless even where the government has failed to make a harmless error argument in its brief. See, *e.g.*, *United States* v. *Torrez-Ortega*, 184 F.3d 1128, 1136 (10th Cir. 1999); *United States* v. *McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997), cert. denied, 118 S. Ct. 2366 (1998); *United States* v. *Rose*, 104 F.3d 1408, 1414 (1st Cir.), cert. denied, 520 U.S. 1258 (1997); *United States* v. *Montgomery*, 100 F.3d 1404, 1407 (8th Cir. 1996); *Horsley* v. *Alabama*, 45 F.3d 1486, 1492 n.10 (11th Cir.), cert. denied, 516 U.S. 960 (1995); *Lufkins* v. *Leapley*, 965 F.2d 1477, 1481 (8th Cir.), cert. denied, 506 U.S. 895 (1992); *United States* v. *Pryce*, 938 F.2d 1343, 1348 (D.C. Cir. 1991), cert. denied, 503 U.S. 941 (1992); *United States* v. *Giovannetti*, 928 F.2d 225 (7th Cir. 1991); see also *United States* v. *Peay*, 972 F.2d 71, 76 n.* (4th Cir. 1992) (Luttig, J., concurring in part and dissenting in part).

In *Giovannetti*, the Seventh Circuit identified three factors for an appellate court to consider when deciding whether to undertake a harmless error analysis in the absence of a harmlessness argument from the government: (1) the length and complexity of the record; (2) the certainty of the harmlessness finding; and (3) whether a reversal will result in protracted, costly, and futile proceedings in the district court. 928 F.2d at 227. Other courts of appeals, including the court below in

this case, have cited *Giovannetti* with general approval, although they have not necessarily viewed the *Giovannetti* factors as comprising an exhaustive list. See, *e.g.*, *Torrez-Ortega*, 184 F.3d at 1136 n.7 ("We do not decide whether the *Giovannetti* factors are exhaustive."); *Rose*, 104 F.3d at 1414 (finding the reasoning of *Giovannetti* "helpful," but not restricting its analysis to the *Giovannetti* factors); *Lufkins*, 965 F.2d at 1481 (noting the *Giovannetti* factors and adding that "when an appellate court conducts a review of the record on its own initiative, it should err on the side of the criminal defendant").[2]

To the extent different courts of appeals describe their discretion in this area in slightly different terms, petitioners make no showing that such variations have produced disparate results. Rather, petitioners rely on a dissenting opinion for the proposition that *sua sponte* harmless error review is always barred. Pet. 13, 15 (citing *Pryce*, 938 F.3d at 1352-1355 (Silberman, J., dissenting). That view was rejected by the majority in that case, and it has not been endorsed by any other court of appeals.

2. Petitioners also challenge (Pet. 15-18) the district court's calculation, for sentencing purposes, of the loss attributable to their fraud. Under Section 2F1.1 of the Sentencing Guidelines, the offense level for crimes

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[2] Petitioners recognize that the Eighth Circuit has previously "followed the *Giovannetti* test," Pet. 12, n.6, but they fault the court of appeals in this case for not expressly discussing why the *Giovannetti* factors support engaging in *sua sponte* harmless error review here. Pet. 14-15. Petitioners cite no authority for the proposition that such express discussion is required. More fundamentally, there was no occasion for the court of appeals to engage in such discussion here, because, as explained above, the court expressly held that the district court committed no error at all.

involving fraud or deceit depends in part on the loss caused by the offender. See Sentencing Guidelines § 2F1.1(b)(1). The application notes to Section 2F1.1 explain that "loss is the value of the money, property, or services unlawfully taken." *Id.* § 2F1.1 comment. (n.7) (1995).[3] Further, "if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." *Ibid.*

In this case, the district court assessed an eleven-level increase in petitioners' offense levels, based on its finding that petitioners caused losses in excess of $800,000. Petitioners contend (Pet. 15-18) that the district court was required to offset that amount by $674,102, the amount that petitioners claim they paid to, or on behalf of, WBA members after they closed the TransPacific account and transferred its deposits to other accounts. As the court of appeals held, however, later repayments "do not necessarily affect the loss determination." Pet. App. 14a. Rather, loss is generally defined as "the value of the money, property, or services unlawfully taken." Sentencing Guidelines § 2F1.1 comment. (n.7) (1995); see *United States* v. *Mucciante*, 21 F.3d 1228, 1238 (2d Cir.) ("Under the Guidelines, 'loss' includes the value of all property taken, even though all or part of it was returned.") (quoting *United States* v. *Brach*, 942 F.2d 141, 143 (2d Cir. 1991)), cert. denied, 513 U.S. 949 (1994). Both the district court and the court of appeals concluded that the funds in the TransPacific account were "initially taken by fraud" from the moment they were deposited in that account. Pet. App. 4a-5a. Moreover, even after

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[3] The same commentary now appears in note 8 to the current version of the Sentencing Guidelines.

whatever repayments petitioners may have made, there were still substantial unpaid insurance claims resulting from petitioners' fraudulent endeavor. *Id.* at 17a (noting the existence of $1,000,000 in unpaid claims).

Contrary to petitioners' assertion (Pet. 17), the decision below does not conflict with decisions of other courts of appeals in which the attributable loss under Section 2F1.1 was reduced by repayments made before discovery of the fraud. See *United States* v. *Stoddard*, 150 F.3d 1140 (9th Cir. 1998), cert. denied 119 S. Ct. 1089 (1999); *United States* v. *Holiusa*, 13 F.3d 1043 (7th Cir. 1994); *United States* v. *Buckner*, 9 F.3d 452 (6th Cir. 1993). The facts here differ significantly from the facts of those cases, as the great majority of the insurance payments for which petitioners seek credit were made *after* their fraud was discovered. Compare Tr. 36-45 (on or about October 2, 1991, officials at CAIC became aware that petitioners were marketing unauthorized health insurance under CAIC's name, and challenged that action) with Def. Exh. 120 (showing that petitioners made health insurance payments after October 2, 1991). As petitioners concede (Pet. 16-17), repayments made after the discovery of the fraud should not be used to offset the loss calculation for sentencing purposes. See, *e.g.*, *Stoddard*, 150 F.3d at 1146 ("Repayments do not apply to actual loss if they are made after discovery of the offense but prior to indictment.").

Moreover, even if petitioners had made the insurance payments before the discovery of their misconduct, the court of appeals' decision in this case would present no intercircuit conflict. *Buckner* involved fraudulent loan applications based on misrepresentation of assets, and thus implicated the specific language of Application

Note 7 to the 1991 version of the Sentencing Guidelines. See 9 F.3d at 453-454. That Note defined "loss" in that specific category of cases as "the amount of the loan not repaid at the time the offense is discovered." *Id.* at 454. Based on that language, *Buckner* held that the sentencing court should have considered only the loan repayments that had been made prior to discovery of the fraudulent scheme. *Buckner* has no application here, as the Guidelines do not similarly define the type of loss caused by petitioners.

In *Stoddard*, the Ninth Circuit endorsed an "economic reality" approach to the determination of actual loss, and advised sentencing courts to "determine what losses the defendant truly caused." 150 F.3d at 1146. The court noted that its approach would reduce the amount of attributable loss in fraud cases by amounts repaid before discovery of the offense. That discussion was mere dictum, however, because the court in *Stoddard* found that the defendant's repayments in that case had all been made after the discovery of his fraud. *Ibid.* In any event, *Stoddard* does not speak to cases such as this one, where the sentencing court found an upward departure warranted because of "an enormous amount of harm and loss attributable to the defendants on actions that cannot be accurately calculated and fit into the guideline criteria." Tr. 3636 (describing extensive collateral harm caused by petitioners' conduct); see Pet. App. 16a-17a. It is anything but clear that petitioners would be assisted by an "economic reality" approach such as that endorsed in *Stoddard*.

Finally, *Holiusa* involved a "Ponzi" scheme where the fraudulent plan itself necessarily included the return of some funds to some investors. The *Holiusa* court found that in such circumstances it was inappropriate to include the gross amount of all the victims'

investments when calculating the total loss for purposes of Section 2F1.1. See 13 F.3d at 1046-1048. *Holiusa* held that where the return of some funds is "an integral aspect of [a] scheme," funds that are returned should not be included as intended loss. *Id.* at 1047. This case does not involve such a scheme. See *United States* v. *Bald*, 132 F.3d 1414, 1417 n.6 (11th Cir. 1998) (distinguishing *Holiusa* and other cases involving "crimes [that] * * * contemplate, by their nature, the payment of some money to the victim" from cases such as this one).

In any event, even if the circuits were divided on this issue, the conflict would be limited to the interpretation and application of Section 2F1.1(b)(1) of the Sentencing Guidelines. As this Court explained in *Braxton* v. *United States*, 500 U.S. 344 (1991), conflicts among the courts of appeals regarding interpretation of the Sentencing Guidelines generally do not warrant plenary review by this Court. Rather, resolution of such conflicts is best reserved for the Sentencing Commission, which has been charged by Congress with reviewing judicial applications of the Guidelines and is empowered by Congress to "make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* at 348.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2000